

TCEQ DOCKET NO. 2013-0820-MWD

IN THE MATTER	§	BEFORE THE
OF THE APPLICATION OF	§	
HAYS COUNTY UTILITY	§	TEXAS COMMISSION ON
DISTRICT No. 5	§	
FOR TCEQ PERMIT	§	ENVIRONMENTAL QUALITY
NO. WQ0014358001	§	

**SAVE OUR SPRINGS ALLIANCE’S REPLY TO THE
EXECUTIVE DIRECTOR AND THE OFFICE OF PUBLIC INTEREST COUNSEL’S
RESPONSES TO HEARING REQUEST**

In their Responses to SAVE OUR SPRINGS ALLIANCE’s (“SOS” or “Requestor”) hearing request regarding the renewal of TCEQ Permit No. WQ0014358001, the Executive Director (ED) and Office of Public Interest Counsel (OPIC) recommended that the request be denied. The ED argues that SOS (1) does not satisfy 30 TAC § 55.205(a)(1); and (2) has no right to a contested case hearing under 30 TAC § 55.201(i)(5). OPIC disagrees with the first argument, indicating that SOS’s comments were timely filed. On the second point, OPIC agrees with the ED.

1) All Comments and the Request for a Contested Case Hearing were Timely Filed.

The ED argues that because the comments of both Kathy Turney, a member of SOS, and SOS were received by the TCEQ’s Chief Clerk after the close of the public comment period, the comments and request for a hearing do not satisfy 30 TAC § 55.201(d)(4), which states that a request “list all relevant and material disputed issues of fact that were raised during the public comment period. . . .”¹

SOS fundamentally disagrees with the ED. Just as OPIC stated, SOS, along with Friendship Alliance and Kathy Turney, timely submitted public comments, a request for a public meeting,

¹ 30 TAC § 55.201.

and a request for a contested case hearing. Moreover, SOS was assured by individuals in the Chief Clerk's Office that the comments, due on August 20, 2012, were timely filed.²

Nevertheless, the TCEQ has the discretion to grant a hearing request in the "public interest."³ Because the results of the renewal of the permit will have a direct impact on the water quality downstream of the Highpointe facility, a contested case hearing is in the public interest and should be granted.

II) SOS has a Right to a Contested Case Hearing on the Proposed Renewal: The ED's Response to Comments are Insufficient Because They Fail to Properly Address Fact Issues Raised by SOS.

The ED and OPIC argue that there is no right to a contested case hearing, because the applicant is not seeking to undertake the type of activities that would confer a right to a contested case hearing.⁴ Each of the conditions of section 55.201(i)(5) must be met in order to conclude that no right to a contested case hearing exists for applications that seek to renew or amend a permit under Texas Water Code, Chapter 26. If all of these conditions are not met, then a request made by an affected person for a contested case shall be granted, so long as the request is made in accordance with 30 TAC § 55.211. While the ED and OPIC correctly outline the law, they both fail to recognize that the ED ignores SOS's factual claims.

For example, the ED has failed to provide adequate consultation or explanation in regards to SOS's comments that the permit is resulting in a direct discharge. To reiterate, the Highpointe permit to date has resulted in elevated nitrates, phosphorus, and bacteria level causing a deprivation of use and enjoyment of property values, foaming and erosion, and degradation of drinking water wells. SOS asserts again, that the City and USGS reports, referenced in its

² SOS had trouble uploading the comments via TCEQ's online system. The Chief Clerk's Office made verbal assurances to SOS that the comments were timely filed. Regardless of system error, the parties were not harmed or put at a disadvantage because of an alternate method of filing.

³ See 30 TAC § 55.211(d).

⁴ See 30 TAC § 52.201(i)(5).

request for a contested case hearing, support the conclusion that the plant is, in fact, discharging wastewater with elevated levels of nitrogen and other pollutants to Spring Hollow and on to Bear Creek, the Edwards Aquifer and Barton Springs. The water quality monitoring performed by technical staff of the City of Austin's Watershed Protection Department during 2009 and 2010 revealed elevated pollutants in a western tributary of Bear Creek downstream of the Highpointe facility, when compared to water quality in the tributary upstream of the Highpointe facility. This monitoring is detailed and summarized in the report *Bear Creek Receiving Water Assessment, January 2009 – March 2010*, by Martha Turner, P.E.⁵ This assessment found nitrates below the Highpointe irrigation fields at levels more than fifteen (15) times higher than nitrate levels above the irrigation fields.

Moreover, excessive algae growth and elevated bacteria was also found below the facility. These findings are consistent with observations of pollution by downstream landowners, which include SOS members. As flows to the plant increase with the buildout of the Highpointe subdivision this pollution will likely increase absent more stringent permit conditions and actual monitoring and inspection of the plant's operations by TCEQ staff.

Stating that Bear Creek is not listed on the state's list of impaired waters, or that discharge is "not anticipated" does nothing to actually respond to the evidence presented that water quality in Bear Creek is being degraded and water quality standards violated by excess nutrients causing excess algae and plant growth, by foaming and foul smelling water, and by elevated bacteria counts.

Moreover, repeating that the permit does not authorize discharge of pollutants to the waters of the state is no real response to abundant evidence showing that such discharge is already

⁵ Available on the web at <http://assets.austintexas.gov/watershed/publications/files/SR-10-10%20BearCreek2009-2010.pdf>.

occurring and is likely to increase. It is also no real response to say that SOS members with property harmed by the discharge may simply sue the plant operators for property and/or personal injury.

The ED has a statutory duty to enforce the laws and to impose more stringent permit conditions where such conditions are necessary to actually assure that no discharge to surface or groundwater occurs from the subject plant. In addition, per the TCEQ's regulations, the ED has a duty to investigate and provide proper consultation and explanation as a result of SOS's comments – a duty it has failed to perform in responding to and evaluating the comments and the contested case hearing request. As such, the ED's response is not proper pursuant to the listed criteria in 30 TAC § 55.209(e).

Because the comments were timely filed and the ED failed to adequately address fact issues presented in its response to comments and in its response to the request for a contested case hearing, the Requestors assert they have a right to a contested case hearing. SOS agrees with OPIC's alternative request analysis that pursuant to 30 TAC § 55.209(e) SOS is an affected person and the issues raised in the comment period – those which are disputed issues of fact, relevant and material – should be referred to SOAH. Therefore, SOS respectfully requests that the TCEQ grant a contested case hearing for the above captioned permit renewal.

Respectfully Submitted,

SAVE OUR SPRINGS ALLIANCE

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CERTIFICATE OF SERVICE

I certify that on July 17, 2013, the “Save Our Springs Alliance’s Reply to the Executive Director and the Office of Public Interest Counsel’s Responses to Hearing Request” regarding TCEQ Permit No. WQ0014358001 was filed with the Texas Commission on Environmental Quality’s Office of the Chief Clerk and a copy was served to all persons listed below list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.

/S/ Adam Abrams

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